TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 168.

THOMAS W. POTTER, APPELLANT,

vs.

MARY HALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED SEPTEMBER 26, 1901.

(16,209.)

(18,269.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 416.

THOMAS W. POTTER, APPELLANT,

vs.

MARY HALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Citation and service	a	1
Petition in error	3	2
Exhibit A—Case-made	4	3
Amended petition	5	3
Exhibit A—Receiver's receipt	6	4
Answer and cross-petition	8	4
Exhibit A—Decision of register and receiver	12	7
B—Decision of Secretary Smith	14	9
C—Decision of Acting Secretary Reynolds	17	10
Motion to strike out exhibits	21	12
Order denying motion to strike out	22	13
Demurrer to answer	24	13
Order overruling demurrer	25	13
Judgment	27	14
Certificate to case-made	29	15
Consent as to case-made	30	15
Judge's certificate to case-made	31	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1901.

	Original.	Print
Order submitting cause	33	17
Judgment	35	17
Opinion	37	17
Assignment of errors	43	24
Petition of appeal	46	25
Order allowing appeal	46	25
Affidavit of value (Thos. W. Potter)	48	26
(Jeff Potter)	49	26
(R. R. Hickox)	50	27
(Wm. Youard)	51	28
(H. K. Ricker)	52	28
(A. C. Springs)	53	29
Supersedeas bond	55	30
Citation (copy)	58	31
Clerk's certificate	59	32

a In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 24th day of September, 1901, pursuant to an appeal filed in the supreme court of Oklahoma Territory, wherein Thomas W. Potter is appellant and you are appellee, to show cause, if any there be, why the judgment, order and decree rendered and entered against said appellant, as in his petition of appeal mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, in the year of our Lord one thousand nine hundred and one, and the Independence of the United States of America, the one hundred and twenty-sixth.

[Seal Supreme Court, Territory of Oklahoma.]

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest: BENJ. F. HEGLER,
Clerk of Supreme Court.

We hereby acknowledge that the above citation was served on us this 29th day of August, A. D. 1901.

F. E. GILLETT,
M. D. LIBBY,
Solicitors for Appellee.

Filed Sept. 11, 1901.
BENJ. F. HEGLER,
Clerk Supreme Court.

[Endorsed:] 1054, Thomas W. Potter, *vs.* Mary Hall, Citation. Filed Sep. 11 1901 Benj. F. Hegler, clerk supreme court, by ——, deputy.

1 Pursuant to the annexed citation and the order granting the appeal in the cause therein mentioned, I do hereby return into the Supreme Court of the United States, a transcript in the record mentioned in appeal and said citation as follows, to wit:

2 Be it remembered that on the 20th day of Dec'r 1900, the plaintiff in error filed his petition in error in the office of the clerk of the supreme court of Oklahoma Territory, together with the case-made thereto attached, which said petition in error and case-made, together with the endorsements thereon are in words and figures following, to wit:

3 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Petition in Error.

The said Thomas W. Potter, the plaintiff in error, complains of said defendant in error, Mary Hall, for the reason that the said Mary Hall, at the March, 1900, term of the district court of Canadian county, Territory of Oklahoma, recovered a judgment by the consideration of said court, against the said Thomas W. Potter in a certain action then pending in said court, wherein the said Thomas W. Potter was plaintiff, and the said Mary Hall was defendant. A certified transcript of the original case-made, duly certified and attested, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said Thomas W. Potter, plaintiff in error, avers that there was error in the said record and proceedings in this, to wit:

First. Said court erred in overruling the demurrer of the plaintiff in error to the amended answer and cross-petition of the defendant in error, to which action, the plaintiff in error at the time excepted.

Second. Said court erred in ruling, after plaintiff's demurrer to said amended answer and cross-petition had been overruled, that plaintiff should plead further to the defendant's answer and cross-petition, plaintiff in error having elected to stand upon said demurrer, and to appeal to the supreme court of the Territory of Oklahoma from said decision and judgment of said demurrer.

Third. Said court erred in rendering judgment against the plaintiff in error and in favor of the defendant in error on the pleadings.

Wherefore plaintiff in error prays that said judgment, so rendered, may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error upon the pleadings, and that the plaintiff in error be restored to all rights he has lost by the rendition of the judgment, and that he have such other and further relief as to the court may seem just.

THOMAS W. POTTER,
Plaintiff in Error,
By J. H. EVEREST,
His Attorney.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

4 EXHIBIT "A."

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOS. W. POTTER, Plaintiff,
v.
MARY HALL, Defendant. } Case-made.

Be it remembered, that heretofore, on January 28th, 1898, the plaintiff, Thos. W. Potter, filed in the district court of Canadian county, Oklahoma Territory, his amended petition, which is in words and figures as follows, to wit:

5 Copy.

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Pl'ff,
vs.
MARY HALL, Def't. } Ejectment.

Amended Petition.

The plaintiff complains of the defendant and alleges as a cause of action herein that the plaintiff is seized in fee-simple and is the legal and equitable owner of the following-described real estate, situate and lying in Canadian county, Oklahoma Territory, to wit: Lots three (3) and four (4) and the south half of the northwest quarter of section numbered four (4) in township numbered twelve (12) north of range numbered seven (7) west, containing about 142.50 acres, and is entitled to the immediate possession of the same; that the plaintiff's title is derived from the United States of America, under section # 2291 of the Revised Statutes of the United States; and plaintiff attaches hereto a true and correct copy of the final receipt or certificate issued to him for said land, and marks the same Exhibit "A" and makes it a part of this petition; that the defendant is occupying a small portion of said land above described, to wit: about two acres in the southwest corner thereof, and that the defendant unlawfully keeps him, the said plaintiff, out of the possession of the same.

Wherefore plaintiff prays for restitution of said premises, and for his costs herein expended.

J. H. EVEREST,
Attorney for Plaintiff.

6 (*Copy of Exhibit "A," Attached to said Amended Petition.*)

(4–140.)

EXHIBIT "A."

Final receiver's receipt No. 2861, application No. 10723.

Homestead.

RECEIVER'S OFFICE,
OKLAHOMA, O. T., *Dec. 8th*, 1897.

Received of Thomas W. Potter, the sum of three dollars 56 cents, being the balance of payment required by law for the entry of lots 3 and 4 and S. ½ N. W. ¼ of section 4 in township 12 N. of range 7 W. containing 142.50 acres, under section 2291 of the Revised Statutes of the United States.

(Copy)

ANTON H. CLASSEN, *Receiver.*

$3.56.

$.75 testimony fee received. Number of written words 500. Rate per 100 words 15 cents.

Said amended petition endorsed on the back as follows: No. 1589. In the district court 2nd judicial district within and for Canadian county, Oklahoma Territory. Thos. W. Potter, pl'ff *vs.* Mary Hall def't. Ejectment. Amended petition. Filed Jan. 28, 1898. J. H. Warren, clerk. J. H. Everest, for pl'ff.

7 That thereafter, to wit, on the first day of March, 1900, the defendant, Mary Hall, filed her answer and cross-petition in said cause in said court, which said answer and cross-petition, is in words and figures as follows, to wit:

8 Copy.

TERRITORY OF OKLAHOMA, } *ss:*
County of Canadian, }

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff, }
vs. } Answer and Cross-petition.
MARY HALL, Defendant. }

The said defendant comes now and by way of answer and cross-petition to the amended petition of the plaintiff, Thomas W. Potter, filed herein, says: That she is the widow of Gilman C. Hall, who, during his lifetime, was a homestead settler upon and pursuant to said settlement made homestead entry number 5077 for the northwest quarter of section four (4), township twelve (12), north of range

seven (7) west, in Canadian county, Oklahoma, and who was, at the time of said settlement, a native-born citizen of the United States, the head of a family, and over twenty-one years of age, and was not, at the time he made such settlement and entry, nor thereafter, seized in fee-simple of a hundred and sixty acres of land in any State or Territory, and did not abandon residence upon land of his own to enter the land in question, and did not enter upon any of the lands by the proclamation of the President opened to settlement on the 22nd day of April, 1889, subsequent to the last day of February, 1889, and prior to noon of April 22nd, 1889, and all times thereafter, to the date of his death, was qualified in all respects under the law to make homestead entry of any portion of the public domain subject to such entry, and was so qualified to make entry upon the above-described tract of land and to receive final patent therefor, and from the time of his settlement upon the tract of land to the date of his death this defendant, as his wife, was a settler with him upon said tract of land, and has continued to occupy the same as a homestead to this date, with lasting and valuable improvements
9 thereon; that during the lifetime of said Gilman C. Hall, and while he was a homestead settler and holding said tract of land under his homestead entry above stated, the plaintiff, Thomas W. Potter, filed in the U. S. land office, at Oklahoma city, a contest against the rights of Gilman C. Hall, to said tract of land, alleging that he, Potter, had a prior and better right thereto by reason of his settlement thereon, which he declared to be prior to the rights of Gilman C. Hall thereto, which said contest was regularly heard by the register and receiver of said land office, at which hearing the rights of Thomas W. Potter to said tract of land under his allegation of prior settlement was also contested upon the grounds that he was disqualified to enter said tract of land, because of the fact, first, that said land was a part of the public domain ceded to the United States by the Muscogee or Creek nation, which cession of land was ratified by act of Congress approved March 1st 1899, and was opened to settlement by proclamation of the President, March the 3rd, 1899, and Second. That said Thomas W. Potter had after the first day of March 1889, and prior to noon of April 22nd, 1889, entered upon said land so open to settlement.

That upon such hearing before said land office the hon. register and receiver found the fact to be that the said plaintiff had entered said land between said dates and was therefore under the statutes disqualified to make settlement or homestead entry thereon, a copy of which said decision of the hon. register and receiver is attached hereto, marked Exhibit "A" and made a part hereof, and afterwards, on the 19th day of February, 1894, said contest having been appealed from the decision of the said honorable register and receiver, to the honorable Secretary of the Interior, who, having the same under consideration, affirmed the decision of the register and receiver in holding the said plaintiff disqualified as above stated, and awarded said land to the entryman, Gilman C. Hall.

That afterwards there was filed by the plaintiff in the office of the Secretary of the Interior, a motion for a review of the said decision

of the Hon. Secretary, which motion being granted, a review of said decision was had by the Hon. Acting Secretary of the Interior, John M. Reynolds, who, upon consideration of the same facts found by the register and receiver, reversed the decision of the Secretary
10 and awarded said land to the plaintiff, a copy of which decision of the honorable Secretary of the Interior and acting Secretary of the Interior are attached hereto, marked Exhibit- B and C and made a part hereof.

That the facts upon which said decision is based are stated in each of said opinions filed herewith and are identical that upon the rendition of the opinion of the Hon. Acting Secretary attached hereto and marked *hereto and marked* Exhibit C said contest between the plaintiff and Gilman C. Hall was closed, and by force of said opinion said land was awarded to the plaintiff and such title as he now has thereto is by reason and force of said opinion, Exhibit C and patent issued conveying said land to him by the United States pursuant thereto.

Defendant herein further says, that the legal title to said tract of land now resting in the plaintiff pursuant to said decision and patent issued to him from the Government, for said land is held in trust for her use and benefit as the widow of Gilman C. Hall, she being the owner of and having the full equities therein by virtue of her said husband's residence and entry of said land, and full compliance with the homestead laws of the United States Government, for the disposition of the public domain, for she says: There was error of law in the conclusion of the Hon. Acting Secretary in his decision, Exhibit C above referred to, in which as hereinbefore stated the opinion of the local office and of the Secretary was reversed, and the rights of Gilman C. Hall, cancelled, in this that on the facts proven and stated in the opinion, "A" "B" and "C" attached hereto, under the law said decision should have been in favor of Gilman C. Hall, affirming the opinion of the Hon. Secretary and that by reason of such error of law, on the part of the Hon. Acting Secretary, the defendant was deprived of her entry and patent to said land and the same was awarded to the plaintiff, contrary to law, the plaintiff herein acquired no equitable right, but that the equities were with the entryman, Gilman C. Hall, and are now with this defendant, that as the widow of Gilman C. Hall, she has the better and superior title to said tract of land, and to the legal title of the plaintiff so acquired.

11 Wherefore, the defendant prays judgment of the court adjudging and decreeing the title of the plaintiff in the land herein described to be held by him in trust for the use and benefit of defendant, and for a decree requiring and directing the plaintiff to execute to her and for her use and benefit a deed of conveyance of said tract of land, and upon his failure to comply with such order that the decree of the court herein be by order of the court made to operate as a conveyance of the same from plaintiff to defendant, and for costs of this action.

F. E. GILLETT,
M. D. LIBBY,
Att'ys for Def't.

TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

Mary Hall, being first duly sworn, upon her oath says: That she is the defendant in the above-entitled case; that she has read and knows the contents of the above answer, on her behalf, and that the allegations thereof are true.

MARY HALL.

Subscribed and sworn to before me this 1 day of M'ch, 1900.
[SEAL.] CHAS. A. NEWMAN,
Notary Public.

My commission expires Nov. 11, 1900.

1589.

12 Copy.

UNITED STATES LAND OFFICE,
OKLAHOMA CITY, O. T., *Nov.* 7, 1891.

THOMAS W. POTTER } Involving H. E. # 5077 for N. W. ¼ Sec. 4,
vs. Twp. 12 N., R. 7 W.
GILMAN C. HALL. }

"Ex. 'A.'"

This tract of land was originally involved in the town-site applications of town of Harrison, which matter was finally disposed of by the Hon. Commissioner's letter "G" of March 11, 1891, leaving this tract of land to be disposed of between the agricultural claimants.

Gilman C. Hall made H. E. # 5077 for said tract on Jan. 13th, 1890.

Thomas W. Potter filed affidavit of contest against the town-site application on May 8th, 1889, alleging prior settlement.

On March 4th, 1890, Potter filed affidavit of contest against the entry of Hall in which he alleges prior settlement on April 22, 1889, that he made application to enter said land (tract) on May 7th, 1889, which was rejected for conflict with the previous town-site application, from which action he appealed, that said Hall was a soldier in the regular army and could not establish a legal residence on said tract and that said Hall has abandoned said tract. A number of other allegations are embraced in said contest which are not material and state no cause of action.

The cause was set for hearing and both parties appeared, waived notice, and submitted their testimony. As we understand this case the issues involved are: First: The prior settlement of Potter and incident thereto his qualifications as a homesteader. Second: The qualifications of Hall as a homestead entryman. Third: The abandonment of Hall or failure to establish residence as required by law.

Under the evidence submitted by both parties we find that Pot-

ter made settlement upon said tract on the 22nd day of April, 1889, and that he has established residence and maintained the same as required by the homestead laws.

13 That Hall established residence upon said tract with his family in October, 1889, and has maintained said residence to the time of trial, though he has been absent most of the time on military duty.

As to the questions of Potter's qualifications, it is shown that for some time previous to the opening of Oklahoma to settlement he has been in the employ of the Indian agent in charge of the Cheyenne and Arapahoe agency, which reservation adjoins the Oklahoma lands on the west. On the morning of April 22, 1889, he was directed by the Indian agent to take charge of 15 Indian policemen and proceed to the east line of the Cheyenne and Arapahoe reservations and preserve order and prevent any settlement on the same. In pursuance of this order, Potter, went to the vicinity of this land on the forenoon of April 22nd, 1889, and during said forenoon went across the line and onto the said tract and ordered persons off the same. Immediately after twelve o'clock he made settlement upon said tract. The authority of Potter obtained from the Indian agent, was only coextensive with the Cheyenne and Arapahoe Indian reservation and did not extend to the Oklahoma lands. His orders were to prevent settlement being made on the reservation and not that he should prevent settlement upon the Oklahoma lands. When he crossed the land onto this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority. The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off of this tract would raise a very strong *influence* (inference) that he had this particular tract in view and intended to settle upon it.

The evidence fails to show that any very valuable or permanent improvements have been made upon this tract by either claimant. In view of all the facts we think the equities are with the entryman, Hall, and that Potter is disqualified from making homestead entry for the said tract.

We therefore recommend that the contest of Potter be dismissed, his application to enter rejected and that the homestead entry of Hall remain intact. 30 days are allowed for appeal.

JNO. H. BURFORD, *Register.*
J. C. DELANEY, *Rec.*

14 Copy.

Ex. B. R. B.

THOMAS W. POTTER
vs.
GILMAN C. HALL.

FEBRUARY 19, 1894.

The Commissioner of the General Land Office.

SIR: This record presents the appeal of Mary Hall, widow of Gilman C. Hall, deceased, from your office, decision dated July 7th, 1892, in the case of Thomas W. Potter *vs.* said Gilman C. Hall, involving the S. ½, N. W. ¼ and lots 3 and 4 sec. 4, twp. 12, N. R., 7 W. Oklahoma city, Oklahoma.

Also the controversy arose upon contest alleging prior settlement and also that Hall being in the military service of the United States was not a qualified homesteader, and that he, Hall, had abandoned the land, initiated, March 4th, 1890, against Hall's homestead entry made for the same, Jan. 13, 1890.

By its said decision your office reversed that of the register — receiver sustained Potter's contest and held the entry of Hall for cancellation. The pending appeal is from this judgment.

This history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889; shortly before this date, Potter had been appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid and is within possibly a quarter of a mile from the tract in question. On this morning of April 22, 1889, some three or four hours before the hour of noon, Potter whom it seems was at said line, seeing some freighters camped on the land involved went thereon to order them off, he then returned to the line and *the* the hour of noon started in the race for a claim, he
15 reached the land before any of his competitors, and as he states commenced his settlement at one-half or one minute after 12 o'clock.

In my opinion the facts just stated sustain the conclusion *the conclusion* reached by the local officers to the effect that Potter was not qualified to enter the tract in question, by going into the Territory on the morning of April 22nd, 1889, before the hour when the lands therein were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an

advantage over rival claim-seekers. It follows under the prevailing rulings (Dean *vs.* Simmons, 17 L. D. 526), and cases cited, that Potter is not qualified to make entry of land in Oklahoma, and that his application to enter the tract in question must be rejected.

The fact that the entryman, Hall, was in the army is not of itself sufficient to invalidate his entry, (Shannon *vs.* Hoffman, 4 L. D. 399) nor does the evidence, (Potter's claim being eliminated from the case) warrant its cancellation on the ground of abandonment.

The entry of Hall will accordingly remain intact. The foregoing de-position of the case renders it (unnecessary?) for me to discuss the other questions presented by the record. The decision appealed from is reversed. Herewith I return the papers.

Very respectfully, HOKE SMITH, *Secretary.*

16 Copy.

TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

I, C. A. Van Ness, a notary public, within and for the county and Territory above mentioned, do hereby certify, that the copies hereto attached are true and correct copies of the decisions of the Secretary of the Interior, of the brief of Gilman C. Hall, of the reply of Gilman C. Hall, of the answer to motion for review, and of the review of acting Secretary of the Interior; in the contest case of Thomas W. Potter, *vs.* Gilman C. Hall, as compared with the instruments now before me.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 4th day of April A. D. 1896.

C. A. VAN NESS,
Notary Public.

My commission expires October 10, 1897.

17 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December* 5, 1895.

THOMAS W. POTTER
vs.
GILMAN C. HALL. } On Review.

Commissioner of the General Land Office.

SIR: On January 13, 1890, Gilman C. Hall made homestead entry on S. ½ of the N. W. ¼ and lots 3 and 4, sec. 4, twp. 12, N. R. 7 W. of the land district of Oklahoma city, Oklahoma.

On March 4, 1890, Thomas W. Potter filed an affidavit of contest, alleging prior settlement and that Hall had abandoned the land, and he was disqualified by reason of his being in the military service of the United States.

The case having reached this department through the course of procedure it was here held February 19, 1894, L. & R. N. O. 281, p.

201, that Potter having entered the Territory of Oklahoma before 12 o'clock noon April 22nd, 1889, was disqualified to make homestead entry therein and, that the evidence did not warrant the cancellation of Hall's entry on the ground of abandonment. Potter had filed a motion for review, the various grounds of which are for the purpose of argument condensed by his counsel into the two following:

"1. In holding as a fact that Potter by entering the Territory prior to noon, necessarily or in any way, secured an opportunity to observe the various tracts of land lying near the line, or thereby secure any advantage over other claim-seekers and particularly over Gilman C. Hall."

2. In holding that by reason of entering said Territory in the line of duty, Potter was disqualified under the law from entering any land, "in the Territory."

The decision on review sets out a statement of the facts on which its conclusions are based as follows:

18 The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within possibly a quarter of a mile from the tract in question.

On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, whom it seems was at said line, seeing some "freighters" camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitors and as he states commenced his settlement at one-half or one minute after twelve o'clock.

Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed *to* him to the command of the police at that point. He neither gained or sought advantage and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby.

19 Proceeding now to consider the case on its merits, the evidence seems conclusive*ly* that Potter was the prior settler

that he established residence upon the land on April 22, 1889, the day of the opening, and maintained it for several months, may be considered as proven.

The efforts of the defendant, Hall, were mainly directed on this branch of the case, to showing abandonment by Potter, but I do not think the testimony sustains his contentions, the latter was called away from home on business during the fall of 1889, and the winter following, but those absences were not of a character to indicate a purpose to abandon his homestead. During that period he made two trips to Carlisle, Pa., in charge of children destined for the Indian school located at that place and spent the winter there in doing work in some capacity, returning in the spring. He is a young man without any family and was accumulating means and swears that his absences from the land *was* rendered necessary by his financial condition.

Both Potter and Hall have improvements. in neither case very expensive or valuable, but sufficient for both to show good faith, but the former's possession is the stronger by virtue of the priority of his settlement. That fact, however, is sufficient to determine the controversy in his favor.

The decision heretofore rendered is therefore revoked, and set aside and your office decision holding Hall's entry for cancellation is affirmed. The papers in the case are herewith returned.

Very respectfully, JOHN M. REYNOLDS,
Acting Secretary.

Endorsed on the back as follows: No. 1589. Thos. W. Potter, *vs.* Mary Hall. Answer and cross-petition. Filed 3, 1, 1900. W. S. Hunter, clerk. Gillett and Libby, att'ys.

20 And thereafter to wit: on June 23rd, 1900, the plaintiff filed in said court his motion to strike certain exhibits from the amended answer and cross-petition of the defendant, filed in said case, which said motion is in words and figures as follows, to wit:

21 Copy.

Motion.

In the District Court, Second Judicial District, within and for Canadian County, Territory of Oklahoma.

THOMAS W. POTTER, Pl'ff,
vs.
MARY HALL, Def't.

Comes now the plaintiff, and moves to strike from the files, and from said amended answer and cross-petition the Exhibits A, B, and C attached to said petition, being the copies of the decisions of the register and receiver of the U. S. land office at Oklahoma city, O. T., of the Commissioner of the General Land Office, Washington, D. C., and of the first decision of the honorable Secretary of the Interior,

which was afterwards vacated, in review, as being irrelevant, immaterial and surplusage.

THOS. W. POTTER, *Plaintiff,*
By J. H. EVEREST, *His Att'y.*

Endorsed as follows: 1589. Potter *vs.* Hall. Motion to strike certain exhibits from amended answer and cross-petition. Filed in open court June 23rd, 1900. E. M. Hegler, clerk.

22 That thereafter, and on to wit the same day, the 23rd day of June, 1900, the said cause coming on for hearing upon the motion of the plaintiff to strike from the amended answer and cross-petition of the defendant certain exhibits attached thereto, marked "A" "B" and "C" after hearing argument of counsel and being fully advised in the premises, the court overrules said motion, to which ruling of the court the plaintiff at the time duly excepted.

23 That on to wit, the 2nd day of March A. D. 1900, the plaintiff filed in said court his demurrer to the answer of the defendant, which said demurrer is in words and figures as follows, to wit:

24 Copy.

In the District Court of the Second Judicial District within and for Canadian County, Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Def't. } Ejectment.

Demurrer to Answer.

Comes now the above-named plaintiff, Thomas W. Potter, and demurs to the amended answer of the defendant, Mary Hall, for the reason that said answer does not state facts sufficient to either constitute any defense to the action of the plaintiff or to state any cause of action against plaintiff.

THOMAS W. POTTER, *Plaintiff,*
By J. H. EVEREST, *His Attorney.*

Endorsed as follows: Case No. 1589. In the district court, Canadian county, Territory of Oklahoma. Thomas W. Potter, pl'ff, *vs.* Mary Hall, def't. Demurrer to answer. Filed 3, 2, 1900. W. S. Hunter, clerk. J. H. Everest for pl'ff.

25 That thereafter, and on to wit: the 23rd day of June, 1900, the said cause coming on to be heard upon the demurrer of the plaintiff to the amended answer and cross-petition of the defendant, and after hearing arguments of counsel and being fully advised in the premises, said demurrer is by the court overruled, to which ruling of the court the plaintiff at the time duly excepted. That plaintiff elects to stand on said demurrer and refuses to plead further in said cause.

26 That thereafter, on the same day, to wit the 23rd day of June, A. D. 1900, the court renders judgment in said cause, which is in words and figures as follows, to wit:

27 In the District Court of Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant.
} Case No. 1589. Journal Entry.

Now, on this 23rd day of June, 1900, the same being a day of the regularly adjourned March term of the said court, the above-entitled cause is regularly called for trial, plaintiff Thomas W. Potter, present by his attorney J. H. Everest, and the defendant Mary Hall, present by her attorneys, F. E. Gillett and M. D. Libby. The defendant asks leave of court to amend her answer and cross-petition herein to make it more definite and certain in the matter of stating the qualifications of Gilman C. Hall (mentioned in said answer and cross-petition), to enter the lands in said answer and cross-petition described under the homestead laws of the United States, and leave is granted to so amend forthwith by interlineation which is done.

Leave is thereupon granted to the plaintiff to file motion to strike out of the defendant's answer and cross-petition certain exhibits thereto attached and in said motion described, and said motion is filed, considered by the court and overruled, to which ruling of the court overruling the said motion the plaintiff excepts.

And thereupon the demurrer heretofore filed by the plaintiff to the defendant's answer and cross-petition is by the plaintiff renewed to the said answer and cross-petition as amended, and the court having fully considered the said demurrer overruled the same to which ruling of the court overruling the said demurrer the plaintiff excepts.

It is then ruled by the court that the plaintiff plead further to the defendant's answer and cross-petition as amended, to which ruling and order of the court to plead further the plaintiffs except-, and refuses to plead further or reply to the defendant's answer and cross-petition as amended, and elects to stand upon his said demurrer thereto, and asks for and is granted sixty days' time from this day in which to make and serve a case-made for the supreme
28 court, and ten days are granted to the defendant in which to suggest amendments to such case-made, the case-made to be settled and signed on five days' notice.

The court thereupon finds that the plaintiff admits the facts stated and alleged in the defendant's answer and cross-petition to be true, and that the same are true, and finds the issues in a favor of the defendant.

It is therefore considered, ordered, and adjudged by the court that the plaintiff, Thomas W. Potter, holds the legal title in and to the land described in his petition and in the answer and cross-petition of the defendant, Mary Hall, in trust for her use, and that

the defendant, Mary Hall, holds the paramount equitable title, right, and interest in and to said land.

And it — further considered, ordered, and adjudged by the court that the said Thomas W. Potter convey to the said Mary Hall, by deed in fee-simple, duly acknowledged, all his right, title, and interest in and to the said lands, more particularly described as follows, to wit: Lots three (3) and four (4) and the south one-half of the northwest quarter of section four (4), in township twelve (12), north of range seven (7), west of the Indian meridian, in Canadian county, Oklahoma Territory, the same constituting the northwest quarter of said section, which deed he is required to deliver to the clerk of this court on or before the 18th day of August, 1900, for the said defendant's use; and if the said Thomas W. Potter shall fail to deliver such deed to the said clerk by the time required herein, then this judgment shall have the same operation and effect and be as available to the said Mary Hall as if the said deed had been executed and delivered comformably thereto.

And it is further considered, ordered, and adjudged by the court that the defendant, Mary Hall, have and recover of and from the plaintiff, Thomas W. Potter, her costs of suit herein expended in the sum of $1.05. To which judgment of the court the plaintiff excepts.

— —.

O. K. J. H. E.,
Att'y for Pl'ff.

Endorsed as follows: No. 1589. Thomas W. Potter *vs.* Mary Hall. Journal entry. Filed 6, 26, 1900. E. M. Hegler, clerk. Filed Dec. 20, 1900. Benj. F. Hegler, clerk supreme court.

29 In the District Court in and for Canadian County, Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant. } Certificate.

I hereby certify that the above and foregoing case-made contains a true and correct statement of all the pleadings, motions, demurrers, orders, findings, and proceedings of every kind and nature had in said cause.

J. H. EVEREST,
Attorney for Plaintiff.

30 In the District Court within and for Canadian County, Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant. } Acceptance of Service.

We, the undersigned, attorneys for the defendant in the above-styled cause, accept service this 5th day of July A. D. 1900, of the

above and foregoing case-made, and consent that said case be settled and signed by the judge of said court without further notice.

F. E. GILLETT,
M. D. LIBBY,
Att'ys for Defendant.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

31 In the District Court in and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant.
} Certificate.

This is to certify that the foregoing above case-made has been duly served in due time, and the same duly submitted to me for settlement and signing as required by law, by the parties to said cause, that the same as above set forth and as corrected by me, is true, full and correct, and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings and judgments had in said cause; and I hereby settle, allow, certify and sign the same as true and correct. And hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at El Reno, in Canadian county, Oklahoma Territory this 5th day of July, 1900.

C. F. IRWIN,
Judge District Court.

Attest:
[SEAL.] E. M. HEGLER,
Clerk of the District Court of Second Judicial District of the Territory of Oklahoma.

Filed this 5 day of July, 1900.

E. M. HEGLER,
Clerk District Court.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

Service of summons upon defendant in the above-entitled cause in the supreme court is hereby waived.

M. D. LIBBY,
Attorney for Defendant.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

32 And at the June term, 1901, of said supreme court, on the third day of June, 1901, the following order was made in said cause, to wit:

33 THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } #1054.

Ordered by the court that this cause be now submitted on briefs and record.

34 And afterward, to wit: at the June term, 1901, of said supreme court, on the sixth day of July, 1901, the following journal entry of opinion in said cause was made in words and figures as follows, to wit:

35 THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } #1054.

Now this cause comes on for final decision by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds; that the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court: That the judgment of the trial court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by McAtee, J., all the justices concurring, except Irwin, J., who presided in the trial of the cause below, not sitting.

36 And at said June term, 1901, on said sixth day of July, 1901, said supreme court rendered a final opinion in said cause, which opinion reads in words and figures as follows, to wit:

37 In the Supreme Court of the Territory of Oklahoma, June Term, 1901.

Filed July 6, 1901.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } No. 1054.

Syllabus.

1. This is a contest for the ownership of a homestead. The plaintiff was under the employment of the Indian agent upon the Cheyenne reservation, at the time referred to. He was directed by the Indian agent, on the morning of the opening to "proceed to the east line of the Cheyenne and Arapahoe, reservation, to preserve order and prevent any settlement on the same."

At twelve o'clock on that day, the lands were opened to settlement, and within a minute or a minute and a half thereafter the plaintiff was upon the land in dispute, asserting his claim to it as a homestead. During that morning he crossed the east line of the Indian reservation and entered upon the lands about to be opened for settlement, and upon the tract of land here in question, for the purpose of removing some persons who were camping there. This entry was a violation of the acts of Congress of March 1st and 2nd, 1889, which provide, with reference to the opening of these lands for settlement, that: "Any person who may enter upon any part of the lands prior to the time that the same are opened to settlement by the act of Congress shall not be permitted to occupy or make entry of such lands or any part thereof," and that "until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

The act of the plaintiff in entering upon the quarter section of land in controversy is a violation of these acts of Congress, and disqualifies him from acquiring title to the land in dispute.

2. The husband of the defendant made the homestead entry upon the land and was, at the time, a citizen of the United States. He subsequently died, leaving the defendant his widow. Under the Revised Statutes of the United States, section 1994, second section of the act of Congress of February 10th, 1855, declaring that "any woman who might lawfully be naturalized under the homestead laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." The defendant is entitled to the privileges of citizenship, and to the acquisition of land under the homestead laws of the United States.

3. At the trial below, upon the overruling of the demurrer of the plaintiff to the answer and cross-petition of the defendant, the plaintiff elected to stand upon his demurrer, and the trial court thereupon rendered final judgment in the case.

Held: That this is the correct proceeding. When a demurrer is overruled, and the defendant elects to stand upon and abide by his demurrer, the submission of the case is a final submission and the judgment thereupon is final.

4. It is objected to the rendition of the judgment in behalf of the defendant, that it was made to appear by a copy of the final receipt from the land office, which the plaintiff had attached to his amended petition, that he had paid out the sum of $3.50, that balance of payment required by law for the entry of the land as a homestead, and he now contends that he should have judgment here because the answer and cross-petition failed to aver a tender into court of this amount. We cannot sustain this contention. The court is constituted for the

purpose of administering justice in matters of grave interest to the parties, and not upon points of trivial moment, tending to promote contentious litigation. The maxim applies that "*de minimis non curat lex.*"

Error from the district court of Canadian county. C. F. Irwin, trial judge. Affirmed.

J. H. Everest, for the plaintiff in error.
F. E. Gillett and M. D. Libby, for the defendant in error.

Statement of Facts.

This was an action, under chap. 66, art. 24 of the Statutes of 1893, for the recovery of real property, lots 3 and 4 and south half of N. W. quarter of sec. 4, twp. 12, N. of R. 7 west 1. M., in Canadian county, under the homestead laws of the United States.

The action was tried upon an amended answer and cross-petition. The defendant alleged that she was the widow of Gilman C. Hall, a native-born citizen of the United States, in all respects a
38 qualified entryman, and entitled to receive final patent therefor, from the time of his settlement to the date of his death some time after he made homestead entry therefor, and that the defendant, as his wife, was a settler with him upon the tract of land and had continued to occupy the same during the lifetime and after the death of the said Hall, and that while the said Hall was a homestead settler, holding the tract of land thereunder, Potter filed a contest against him, alleging priority of his right, and that hearings were had, findings of fact made and decisions rendered by the register of the local land office, by the Commissioner of the General Land Office, by the Secretary of the Interior, and afterward and finally upon review, by the acting Secretary of the Interior, in the absence of the Secretary; that in all these hearings, the findings of fact and the respective judgments of these officers had been uniformly in favor of the right asserted by the homestead entry of the defendant, except that finally and upon the motion for review before the acting Secretary of the Interior, he, upon a consideration of the same facts found by the register and receiver of the local land office, by the Commissioner of the General Land Office and of the Secretary of the Interior, reversed the decision of the Secretary and awarded the land to the plaintiff, Potter. Copies of the findings of fact of the register and receiver are annexed to the answer and cross-petition of the defendant thereto with proper averments, the defendant declaring that findings of fact and conclusions of law made by the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, were correct, and that the order made by the acting Secretary of the Interior subsequently, by which she was deprived of her entry and patent to the land, which was by the acting Secretary awarded to the plaintiff, Potter, was contrary to law, and that the equities had been with the entryman, Gilman C. Hall, and were now with his widow, the defendant.

The prayer was for a decree declaring a trust in the plaintiff for the benefit of the defendant, Hall, and directing the execution of a deed accordingly.

The plaintiff demurred to this amended answer and the affirmative averments of the cross-petition. The demurrer was overruled by the court below, and the plaintiff elected to stand upon his demurrer and final judgment was entered in the case in favor of the defendant. The case is brought here by the plaintiff, Potter, who seeks a reversal of this judgment.

Opinion of the court by McATEE, *J.*:

The findings of fact material to a determination of the case were practically identical as made by the register and receiver of the local land office, by the Secretary of the Interior and by the acting Secretary of the Interior, upon review of the case.

They were that Potter had made settlement upon the tract of land upon the 22nd day of April, 1889, and had established residence and maintained the same as required by the homestead laws. That Hall who had the homestead entry established residence upon the land with his family in October, 1889, and has maintained that residence up to the time of the trial in the land office. It was found that for some years previous to the opening of Oklahoma to settlement, he had been in the employment of the agent in charge of the Cheyenne and Arapahoe Indian agency, which adjoins the Oklahoma lands on the west. On the morning of April 22nd, 1889, he was directed by the agent to take charge of a squad of Indian policemen and proceed to the east line of the reservation for the purpose of preserving order and preventing any settlement thereupon. In pursuance of this order, he went to the vicinity of the land in question on the forenoon of April 22nd, 1899, and during the morning went across the line, and upon the tract of land in question and ordered off some persons who were camping thereupon. At 12 o'clock, the hour at which the lands were opened for settlement, he again left the land and line of the Indian reservation and immediately thereafter, within a minute or a minute and a half, made settlement upon the land in question.

The act of Congress which provided for the opening of these lands, enacted March 1st, 1889, and found in section 2 chapter 317, Statutes at Large, provides that:—

39 "Any person who may enter upon any part of said lands in said agreement mentioned, prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or make entry of such lands or any part thereof."

And the act of Congress of the next day, March 2nd, 1889, 25 Statutes at Large, chapter 412, provide, with reference to the same lands, that:—

"Until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

It is upon these undisputed statements of fact and upon this condi-

tion of the law, that the acting Secretary of the Interior came to the conclusion that since he, Potter, "had been employed at the Cheyenne and Arapahoe agency near by for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute, he had nothing to gain or to learn, therefore, by the short excursion with which he is charged, and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained or sought advantage, and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby."

The explicit terms of the Federal statute, with its clear and peremptory prohibition, do not leave this question open to be determined by inferences. Potter was appointed on the Indian force on the morning of the opening of the land for settlement, April 22, 1889, and was directed by the Indian agent to "proceed to the east line of the Cheyenne and Arapahoe reservation to preserve order and prevent any settlement on the same." When he crossed the east line of the Indian reservation and entered upon the lands which were about to be opened for settlement upon the same day, and entered upon the tract of land which he afterward and on the same day undertook to occupy as a homestead, it was not in pursuance of the duty thus deputed to him by the Indian agent. He was acting in excess of it. The Indian agent had no authority to authorize him to cross the line of the Indian reservation, and did not authorize him to do so. When he crossed that line and entered upon the land in dispute here, he placed himself expressly under the prohibition of the statute against "entering upon any part of said lands," and under the penalty which provides that such person "shall not be permitted to occupy or make entry of such lands or any part thereof" "or acquire any right thereto."

And this violation of the Federal statute cannot be reasoned away by the suggestion made by the acting Secretary of the Interior, that "he had been employed at the Cheyenne and Arapahoe agency for six years before the opening of the country to settlement, had lived in close proximity to the land in dispute, and had nothing to gain or to learn," and that when he made "the short excursion with which he is charged, and which cannot be denied was made in performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point, he neither gained or sought advantage," and that it was "error to hold that, under the circumstances of the entry into the Territory, he was disqualified thereby."

It was held in Smith *v.* Townsend, 148 U. S. 490, upon the statutes governing this matter, that:—

"The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter' etc., but 'any person who may enter,' 'rightfully or wrongfully,' is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the

company's right of way, for it is obvious that when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately get into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities."

This determination of the Supreme Court upon the statutes in question has been affirmed in Payne *v.* Robinson, 169 U. S. 323, and Calhoun *v.* Violet, 173 U. S. 60.

40 We therefore conclude that the acting Secretary of the Interior misapplied the law, and that it was properly and correctly interpreted in the opinion of the register and receiver of the United States land office at Oklahoma city, to the effect that "his orders were to prevent settlement upon the Oklahoma lands. When he crossed the land upon this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority."

We feel the less hesitation in reversing the conclusion of the last tribunal of the Land Department "on review" not only because the conclusion we now arrive at is that which must necessarily be arrived at upon the facts, but also because it was the one accepted by the Secretary of the Interior, as well as the Commissioner of the General Land Office.

It is however, argued that the answer and cross-petition of the defendant in error, Mary Hall, fail to show that she is entitled to relief, since they did not allege that she is either a native-born or a naturalized citizen of the United States, and that therefore the averments of her pleading fail to show that she is qualified to make final proof.

This objection fails to take into view the express provision of section 2 of the act of Congress of February 10th, 1855, which declares that:—

"Any woman who might lawfully be naturalized under the existing laws married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."—Revised Statutes of the United States, section 1994.

And it is held in Kelly *v.* Owen, 7th Wall. (U. S.) 496, that this act of Congress confers the privilege of citizenship upon women married to citizens of the United States, and that under it, the citizenship of the husband, whenever it exists, confers citizenship upon the wife.

It is also contended that the answer and cross-petition in failing to show that Gilman C. Hall and his wife lived upon said land for five years or more, is insufficient.

It was not necessary for Gilman C. Hall to have lived on the land for five years. It is shown, however, that he resided upon the land from October 1889, and that he resided thereon up to the time of his death, and that his wife, the defendant herein, has resided thereon

continuously up to the present time, and has made valuable improvements thereupon. This is a sufficient averment of residence upon the circumstances of this case. If it should be held otherwise, then, if a husband should die before the lapse of the period necessary to perfect and complete his residence, the statute authorizing his widow to acquire title by virtue of his citizenship and her own, would be rendered void, which was certainly not the purpose of Congress.

It is also contended that when the trial court overruled the demurrer of the plaintiff and the plaintiff elected to stand upon his demurrer, and the trial court thereupon rendered final judgment in the case, that this rendition of final judgment was reversible error. We cannot sustain this view.

It was held in McNasser *v.* Sherry, 1 Colo. 12, and in Bates *v.* Williams, 43 Ill. 494, that if the defendant does not plead on overruling demurrer to a declaration, default judgment should be entered. And it is generally held that when a demurrer is overruled and the demurrant does not plead over or answer, but stands upon and abides by his demurrer, the submission of the case upon the demurrer is a final submission and the judgment thereupon is final.—6th Enc'y of Pl. & Pr. p. 366, and cases there cited.

The plaintiff attached to his amended petition a copy of the final receipt or certificate issued to him for the land. It showed that, after the litigation in the Land Department was over, namely, on the 8th day of December, 1897 he had paid out the sum of $3.56, the balance of payment required by law for the entry of the land as a homestead under section 2291 of the Revised Statutes of the United States, and he now contends that he should have judgment here, because the answer and cross-petition wholly fails to allege that the defendant in error offered to pay or tender into court this amount of land-office fees for the final proof paid by Potter.

41 The subject of the contention was 140 acres of valuable land. The controversy in the Land Department was carried on through a period of 7 or 8 years. It is now renewed in the courts, and is recognized by both parties as of much importance. Even if the case was one which required the tender of these fees by the defendant in her cross-petition, she would not be denied her equity, because of the omission to tender so trivial a sum. The court, by its final decree, can require the repayment of the sum mentioned, but it would be unworthy the dignity of this court, in so serious a litigation, while sitting in equity and endeavoring to administer justice in matters of grave interest to the parties, to hold that this homestead should now be turned over to the plaintiff, who is not entitled to it under the statutes of the United States, because the defendant failed to make an express tender of a sum so trivial. To make such a ruling would be, not to administer equity, but to use the power and jurisdiction of the court to do injustice, and to promote contention and vexatious litigation, upon points of trivial interest and consequence.

The judgment of the trial court will be affirmed. All the justices concur, except Irwin, J., who presided below.

42 Be it further remembered that on the 26th day of August A. D. 1901, there was filed in said cause, the plaintiff's assignment of error- in words and figures following, to wit:

43 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Assignment of Errors.

Now, on this 20th day of August A. D. 1901, comes the said plaintiff in error by J. H. Everest and John W. Shartel, his solicitors and says that the decree and judgment rendered in this cause in this court on the 6th day of July A. D. 1901, are erroneous and against the just rights of the said plaintiff, for the following reasons:

First. Because this court erred in affirming the judgment and order of the court below, appealed from.

Second. The court erred in holding that as a matter of law that the acts of plaintiff amounted to a disqualification to make entry of the lands in controversy under the homestead laws of the United States.

Third. The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in the court below to the answer and cross-petition of the said Mary Hall, the defendant in the court below, to wit: the district court of the county of Canadian and Territory of Oklahoma.

Fourth. The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in that court because and for the reasons that the answer and cross-petition of the defendant in the court below failed to state sufficient grounds for equitable relief or for the cancellation of the patent issued to the plaintiff for the land in controversy by the Government of the United States.

44 Fifth. This court erred in sustaining the action of the district court of Canadian county in rendering judgment and decree for the transfer of the legal title of the land in controversy from the plaintiff to said defendant.

JOHN W. SHARTEL AND
J. H. EVEREST,
Solicitors for Plaintiff in Error.

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Assignment of errors. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

45 Be it further remembered that on the 26th day of August, 1901, there was filed in said cause a petition for appeal, order granting the same and affidavits of value in controversy, in words and figures following, to wit:

46 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Comes now the above-named plaintiff in error, Thomas W. Potter, and considering himself aggrieved by the decree and judgment made and entered in this cause on the 6th day of July A. D. 1901, does hereby appeal from said judgment, order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order, and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that the amount of the appeal bond which shall operate as a supersedeas be fixed, and a reasonable time allowed in which to enter the same; the said plaintiff also files herewith the affidavits of the amount in controversy, showing that the amount in dispute herein exclusive of costs exceeds the sum of five thousand dollars ($5,000.00).

JOHN W. SHARTEL AND
J. H. EVEREST.

The foregoing claim of appeal, together with the affidavits of Thomas W. Potter and Jeff Potter, and R. R. Hickox and A. E. Saxey and Wm. Youard, H. K. Ricker and A. C. Springs as to the value or amount in controversy in this action is submitted to me, this 24 day of August A. D. 1901, and upon examination thereof, I find that the value or sum in controversy, exclusive of costs exceeds the sum of five thousand dollars ($5,000.00); and the foregoing appeal is hereby by me allowed, and the said appeal granted, and the amount of the plaintiff's appeal bond which shall operate as a supersedeas, is fixed at the sum of one thousand — ($1,000.00), as conditioned by law and rule of the Supreme Court of the United States, and which shall be filed in the office of the clerk of
47 the supreme court of Oklahoma Territory, and approved by the chief justice or one of the associate justices of said court on or before ten days from this date.

B. F. BURWELL,
Associate Justice Supreme Court of Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Petition for appeal and order allowing appeal. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

48 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

Personally appeared before me, the undersigned authority within and for the county aforesaid, Thomas W. Potter, who after being by me first duly sworn, deposes and says: That he is the plaintiff in error in the above-entitled action, that the value of the subject-matter of said controversy, to wit: the south half of the northwest quarter and lots three (3) and four (4) of section four (4) in township twelve (12) N. of range seven (7) west Indian meridian, in Canadian county, Oklahoma Territory, exceeds the sum or amount of five thousand dollars ($5,000.00) lawful money of the United States, and is of the value of six thousand dollars ($6,000.00) at this date.

That affiant makes this affidavit for the purpose of fixing the value of the said property involved in said suit for the purpose of showing that said action is appealable from the supreme court of the Territory of Oklahoma to the Supreme Court of the United States of America.

THOMAS W. POTTER.

Subscribed and sworn to before me this 14th day of August, 1901.
[SEAL.] NEWTON AVEY,
Notary Public.

My commission expires March 9, 1902.

Indorsed on back as follows: Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

49 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } *ss:*
Canadian County,

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid, Jeff Potter, being by me first duly sworn deposes and says, that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and

has been acquainted with said tract for more than five years last past and that he knows the value thereof.

That on this day, to wit: the 15th day of August, 1901. said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand — ($6,000.00) and further dependent sayeth not.

JEFF POTTER.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

50 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Canadian County,* } *ss:*

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid R. R. Hickox, being by me first duly sworn deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract for more than five years last past and that he knows the value thereof.

That on this day, to wit: the 15th day of August, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

R. R. HICKOX.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk Supreme Court.

51 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid, Wm. Youard, being by me first duly sworn deposes and says, that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally, with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

WM. YOUARD.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expired April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

52 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid H. K. Ricker being by me first duly sworn deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the

northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

H. K. RICKER.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

53 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Canadian County,* } *ss:*

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid A. C. Springs, being by me first duly sworn, deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

A. C. SPRINGS.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

54 Be it remembered that on the 26th day of August, 1901, there was filed in said cause a supersedeas bond in words and figures following, to wit:

55 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Know all men by these presents, that we, Thomas W. Potter, as principal, and The United States Fidelity and Guaranty Company, a corporation, as sureties, are held and firmly bound unto the defendant in error, Mary Hall, above named, in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Mary Hall, her representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, A. D. 1901.

The conditions of this obligation are as follows: Whereas on the 6th day of July, A. D., 1901, at a session of the supreme court of the Territory of Oklahoma, held at the city of Guthrie, in said Territory in an action pending in said court between the above-bounden principal as plaintiff in error and the above-named obligee as defendant in error, there was a judgment, order and decree rendered against the above-bounden principal in favor of the above-named obligee affirming a certain judgment of the district court of the county of Canadian and Territory of Oklahoma, in a case theretofore pending in said district court, wherein the above-bounden principal was plaintiff and the above-named obligee was defendant, rendered against the prayer of the said plaintiff in the court below for relief therein demanded, and the said plaintiff in error having filed his petition for appeal, together with his assignment of error on the appeal to the Supreme Court of the United States to said judgment from the supreme court of said Territory, and the said appeal being granted and the supersedeas bond being allowed to stay the operation of said judgment during the pendency of said appeal, and the citation being duly issued
56 to the obligee, Mary Hall, cited for a session of the Supreme Court of the United States of America, to be holden at the city of Washington on the 24th day of September A. D. 1901; now, the condition of this obligation is such that if the said above-named principal shall prosecute his said appeal to effect and answer all damages and costs, including all interest, and pay all damages that the said obligee may sustain on account of the suspension of the said judgment aforesaid, during the pendency of

said appeal if he fails to make his plea good then the above obligation to be void; else to remain in full force and effect.

THOMAS W. POTTER, *Principal.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By T. M. UPSHAW, *Its Attorney-in-fact.*
Sureties.

The foregoing bond is hereby approved by me on this the 24th day of August, 1901.

B. F. BURWELL,
Asso. Jus. Sup. Ct. of Oklahoma Territory.

Endorsed on back as follows: 1054—Thomas W. Potter *vs.* Mary Hall—Supersedeas bond—Filed Aug. 26, 1901—Benj. F. Hegler, clerk supreme court.

57 Be it further remembered that on the 11th day of September, 1901, there was filed in said cause a copy of the citation, which said copy is in words and figures following, to wit:

58 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 24th day of September, 1901, pursuant to an appeal filed in the supreme court of Oklahoma Territory, wherein Thomas W. Potter is appellant, and you are appellee, to show cause, if any there be, why the judgment, order and decree rendered and entered against said appellant, as in his petition of appeal mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, in the year of our Lord one thousand nine hundred and one, and the Independence of the United States of America, the one hundred and twenty-sixth.

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest:
[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.

We hereby acknowledge that the above citation was served on us this 29th day of August, A. D. 1901.

F. E. GILLETT,
M. D. LIBBY,
Solicitors for Appellee.

Filed Sept. 11, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court.

Indorsed on back as follows: 1054 Thomas W. Potter *vs.* Mary Hall. Citation.

59 UNITED STATES OF AMERICA, } *ss:*
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing pages numbered from one to fifty-eight, inclusive, is a full, true and complete transcript of the record and all proceedings in said supreme court of the Territory of Oklahoma, in the case of Thomas W. Potter, plaintiff in error, against Mary Hall, defendant in error, as the same appear upon the files and of record in the supreme court of the Territory of Oklahoma.

In testimony whereof, I have hereunto subscribed my name and caused the seal of said court to be affixed, at my office, in the city of Guthrie, on this 16th day of September A. D. 1901, and of the Independence of the United States of America the one hundred and twenty-sixth.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court of Oklahoma Territory.

Endorsed on cover: File No. 18,269. Oklahoma Territory supreme coart. Term No. 416. Thomas W. Potter, appellant, *vs.* Mary Hall. Filed September 26th, 1901.